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U.S. Citizenship
and Immigration
Services

File: LIN 02 170 53319 Office: NEBRASKA SERVICE CENTER

Date: APR 21 2004

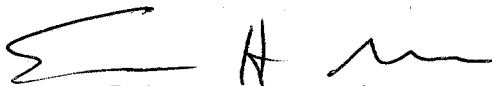
IN RE: Petitioner:
Beneficiary

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel provides copies of exhibits previously submitted and a brief.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted for processing on April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$19.85 per hour, which equals \$41,288 per year.

With the petition, counsel submitted the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner reports taxes pursuant to the calendar year, and that during 2001 the petitioner declared ordinary income of \$23,905. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$26,941 and current liabilities of \$1,591, which yields net current assets of \$25,350.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Director, Nebraska Service Center, on June 26, 2002, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the director specifically requested that copies of annual reports, federal tax returns, or audited financial statements be included as part of the evidence of the petitioner's ability to pay the proffered wage.

In response, counsel submitted an article pertinent to the duties of convenience store managers, a copy of a three-year lease of the petitioner's premises, and copies of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for 1999, 2000, and 2001. Further, counsel submitted a copy of U.S. census data pertinent to retail businesses. Further still, counsel submitted copies of the petitioner's monthly bank

statements for January 2001 through December 2001.

Because the priority date is April 16, 2001, tax returns and bank statements pertinent to previous periods are of limited relevance to the petitioner's ability to pay the proffered wage on and after the priority date. The relevance of the 2001 tax return and the bank statements for periods after the priority date is addressed below.

Counsel also submitted a 17-page discussion of the petitioner's business signed by the petitioner's president. Most of that discussion is only peripherally related to the petitioner's ability to pay the proffered wage. In a somewhat rambling "Summarization [sic] of evidence that [the petitioner] had and still possesses the ability to pay the proffered wage" the petitioner's president mentioned the "gut feel" of small business owners, the petitioner's gross receipts, officer compensation, gross profit; wage expense and other expenses. The petitioner's president stated that those figures "unequivocally establish that [the petitioner] has capability [sic] of paying the proffered wage to the beneficiary," but did not state how. The president also stated that he believes that hiring the beneficiary will increase the petitioner's gross receipts and profits. Although the president made some observations pertinent to some of the exhibits submitted, he drew no connection between them and the petitioner's ability to pay the proffered wage.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on January 14, 2003, denied the petition.

On appeal, counsel submits copies of various exhibits previously provided and a brief. The only analysis in that brief of the evidence pertinent to the petitioner's ability to pay the proffered wage is a discussion of the petitioner's increased revenue and increased salary and wage expense from 1999 through 2001. Counsel states that those figures show that the petitioner possessed the ability to pay the proffered wage. Counsel criticized the use of "*selected entries*" [Emphasis in the original.] from the petitioner's tax returns, but did not state in what other way the returns might have been considered. Counsel also criticized the refusal of the director to consider the petitioner's bank account statements as evidence of its ability to pay the proffered wage. Counsel further implies that the beneficiary would generate additional income for the petitioner by performing as its manager, but provides no evidence in support of that proposition other than to describe the duties of the petition and to cite the success of Southland Corporation's 7/11 stores.

Finally, counsel states that the director had no objective basis for suspecting that the petitioner is unable to pay the proffered wage. In so stating, counsel has turned the burden of proof on its head. The director is not obliged to prove that the petitioner is unable to pay the proffered wage. The petitioner, or the petitioner through counsel, is obliged to demonstrate that that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date. The director must determine whether the petitioner or counsel successfully demonstrated that ability.

The petitioner's reliance on checking account balances, gross receipts, gross profits and the amount of the petitioner's officer compensation, salary and wage expenses, and other expenses is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are preferred evidence of a petitioner's ability to pay a proffered wage. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns.

Showing that the petitioner's gross receipts or gross profits exceeded the proffered wage is insufficient. Showing that the petitioner paid wages or other expenses in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses¹ or otherwise increased its net income², the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's ordinary income.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed the beneficiary.

If the petitioner does not establish that it paid the beneficiary an amount equal to or greater than the proffered wage during that period, the AAO will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

The priority date is April 16, 2001. The proffered wage is \$41,288 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 2001, but only that portion which would have been due if it had hired the beneficiary on the priority date. On the priority date, 105 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 260 days. The proffered wage multiplied by 260/365th equals \$29,410.63, which is the amount the petitioner must show the ability to pay during 2001. Because the petitioner has not demonstrated that it paid any wages to the beneficiary during the portion of 2001 after the priority date, this office will seek evidence of the petitioner's ability to pay the proffered wage on its tax return.

During 2001, the petitioner declared ordinary income of \$23,905. That amount is insufficient to pay the salient portion of the proffered wage. At the end of that year, the petitioner had net current assets of \$25,350.

¹ The petitioner might, for example, demonstrate that the beneficiary would replace a specific named employee, whose wages would then be available to pay the proffered wage.

² The petitioner might demonstrate, rather than allege, that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

That amount is also insufficient to pay the salient portion of the proffered wage. The petitioner has not demonstrated that any other funds were available to it to pay the salient portion of the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during the portion of 2001 after the priority date, and has not, therefore, established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.